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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 **LARRY DEAN PADILLA,**

15 Plaintiff,

16 v.

17 **M. S. EVANS,**

18 Defendants.
19

CASE NO. C 06-1725 JF

**DEFENDANT'S OPPOSITION
TO PLAINTIFF'S MOTION
TO REINSTATE CAUSE**

20 **INTRODUCTION**

21 Plaintiff moves to have all of the unexhausted claims previously dismissed in this lawsuit
22 reinstated on the grounds that he attempted to comply with the mandatory exhaustion
23 requirement set forth in the Prison Litigation Reform Act. However, Plaintiff's motion must be
24 denied because he failed to comply with the procedural requirements necessary before a court
25 may reconsider its interlocutory order and because his recent attempts to exhaust do not
26 constitute proper exhaustion under federal law.

27 **PROCEDURAL HISTORY**

28 On January 29, 2007, Plaintiff filed his First Amended Complaint raising Eighth

1 Amendment and Fourteenth Amendment claims against Warden Evans (Defendant) beginning on
 2 January 1, 2005 and continuing until January 25, 2007. (Ct. Docket # 59.) Specifically, Plaintiff
 3 alleged that Defendant violated his Eighth Amendment right to outdoor exercise from January 1,
 4 2005 until January 25, 2007 and his Fourteenth Amendment right to equal access to outdoor
 5 exercise and other various prison programs for the same time period. (*Id.*)

6 On June 13, 2007, Defendant filed a motion to dismiss arguing that all of Plaintiff's claims,
 7 except for those alleging the denial of outdoor exercise from January 1, 2005 through January 26,
 8 2005, must be dismissed due to Plaintiff's failure to exhaust his administrative remedies with
 9 respect to these claims before filing suit. (Ct. Docket ## 78-81.) On November 26, 2007, the Court
 10 granted Defendant's motion in part and denied it in part, dismissing all of Plaintiff's Eighth
 11 Amendment and equal protection claims arising after January 26, 2005, due to Plaintiff's failure
 12 to exhaust his administrative remedies with respect to these claims. (Ct. Docket # 94.)
 13 However, the Court held that Plaintiff properly exhausted his Eighth Amendment claim of
 14 inadequate outdoor exercise and his Fourteenth Amendment claim of unequal access to outdoor
 15 exercise from January 1, 2005 until January 26, 2005, and allowed these claims to go forward.
 16 (*Id.*)

17 On May 2, 2008, Defendant filed a motion for summary judgment on the grounds that there
 18 are no genuine issues as to any material fact with respect to the remaining claims and Defendant
 19 is entitled to qualified immunity. (Ct. Docket ## 102-106.) On May 20, 2008, Plaintiff served
 20 Defendant with a copy of his "Motion to Reinstate Cause," wherein he requests the Court to
 21 reinstate the previously dismissed unexhausted claims into this lawsuit. Defendant files this
 22 opposition to Plaintiff's "Motion to Reinstate Cause."

23 ARGUMENT

24 I.

25 **PLAINTIFF'S MOTION IS NOT PROPERLY BEFORE THE COURT.**

26 In his motion, Plaintiff cites to no authority authorizing the Court to reinstate formerly
 27 dismissed claims into an existing lawsuit. (Pl.'s Mot. Reinstate Cause at 1-2.) However,
 28 because Plaintiff is attempting to have the Court reconsider its order dismissing some of his

1 claims on exhaustion grounds, it is best viewed as a motion for reconsideration. Under the
2 Northern District's Civil Local Rules, before seeking relief from an interlocutory order, the party
3 requesting relief must first "make a motion before a Judge requesting that the Judge grant the
4 party leave to file a motion for reconsideration." Civ. L.R. 7-9 (a). Indeed "[n]o party may
5 notice a motion for reconsideration without first obtaining leave of Court to file the motion." *Id.*

6 Moreover, when filing a motion for leave to file a motion for reconsideration, the moving
7 party must specifically show one of the following: 1) that a material difference of fact or law
8 exists now from that which was presented to the district court before entry of the interlocutory
9 order and that the party did not, in the exercise of reasonable diligence, know of such fact or law
10 at the time of entry of the interlocutory order; or 2) the emergence of new material facts or a
11 change of law occurring after the entry of the interlocutory order; or 3) a manifest failure by the
12 district court to consider certain material facts or dispositive legal arguments which were
13 presented to the court before entry of the interlocutory order. Civ. L. R. 7-9(b).

14 In his Motion to Reinstate Cause, Plaintiff does not seek leave of Court to file a motion for
15 reconsideration of its order dismissing some of Plaintiff's Eighth Amendment and Fourteenth
16 Amendment claims on exhaustion grounds. (Pl.'s Mot. Reinstate Cause at 1-2.) Plaintiff also
17 fails to specifically show a material difference of law or fact from that which was originally
18 presented to the court in Defendant's motion to dismiss, or the emergence of new material facts
19 or law, or a manifest failure by the Court to consider certain material facts or legal arguments
20 before granting Defendant's motion to dismiss in part. (*Id.*) Rather, Plaintiff merely states that
21 after the Court dismissed all unexhausted claims without prejudice, he attempted to exhaust them
22 by filing an untimely administrative appeal, which was screened out by the prison's Appeals
23 Coordinator, and by filing a writ of mandate in state court in an effort to force the prison to
24 respond to his inmate appeal. (*Id.* at 1-2.) These statements do not demonstrate compliance with
25 the Local Rules for filing a motion for reconsideration. Accordingly, Plaintiff's Motion to
26 Reinstate Cause must be denied.

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1 II.

2 **EVEN IF THE COURT CONSTRUES PLAINTIFF'S REQUEST AS A MOTION**
 3 **FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION, THE COURT**
 4 **CANNOT ULTIMATELY GRANT THE RELIEF PLAINTIFF REQUESTS.**

5 Assuming arguendo that the Court finds Plaintiff's motion to be procedurally proper, the
 6 Court does not have the authority to grant the relief Plaintiff seeks. This is because under the
 7 Prison Litigation Reform Act, a prisoner must exhaust his available administrative remedies
 8 before filing suit, not while a case is pending in federal court. *See Vaden v. Summerhill*, 449
 9 F.3d 1047, 1050-51 (9th Cir. 2006) (holding that a prisoner must have entirely exhausted his
 10 administrative remedies before submitting any papers to federal court, and may not exhaust while
 11 a lawsuit is pending); *accord McKinney v. Carey*, 311 F.3d 1198, 1201 (9th Cir. 2002).
 12 Moreover, the Court cannot, as Plaintiff suggests in his moving papers, waive the exhaustion
 13 requirement because Plaintiff's failure to submit a timely inmate appeal leaves him with no
 14 available administrative remedy. *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006) ("Proper
 15 exhaustion demands compliance with an agency's deadlines and other critical procedural rules
 16 because no adjudicative system can function effectively without imposing some orderly structure
 17 on the course of its proceedings.").

18 Because Plaintiff cannot ultimately gain the relief he seeks even if this motion is deemed to
 19 be procedurally proper, his motion to reinstate his unexhausted claims must be denied.

20 **CONCLUSION**

21 Plaintiff's motion to reinstate all previously dismissed unexhausted claims must be denied
 22 because Plaintiff failed to comply with the Northern District's Civil Local Rules for filing a
 23 motion for reconsideration. Moreover, even if the court finds Plaintiff's motion to be
 24 procedurally proper, Plaintiff's motion must still be denied because the Court has no authority to
 25 grant the relief Plaintiff seeks. Accordingly, Defendant respectfully requests that Plaintiff's

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1 Motion to Reinstate Cause must be denied.

2 Dated: May 28, 2008

3 Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Padilla v. Evans**

No.: **C 06-1725 JF**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 28, 2008, I served the attached

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO REINSTATE CAUSE

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Larry D. Padilla (P-05966)
Salinas Valley State Prison
P. O. Box 1050
Soledad, CA 93960-1050
In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 28, 2008**, at San Francisco, California.

M. Luna

Declarant



Signature